

Police against the accused Eng Hong, but *solely* for the purpose of impeaching the credit or credibility of the witness himself.

Section 155 of the Evidence Ordinance makes it clear that the credit of a witness may be impeached, with the consent of the Court, by the party who called such witness "by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

The learned President, in his reference to this Court giving the reasons for his decision, has stated that even if the witness—i.e. the present accused—had told the Magistrate that his daughter had told him who stabbed her, the witness would not have been permitted to continue and say that she had told him that it was her husband Eng Hong, since such evidence would have been hearsay and inadmissible. That, of course, is perfectly true. But what the witness—i.e. the present accused—did say was "She did not tell me who stabbed her". That, on the face of it, was directly contradictory to the previous statement the witness had made to the Police and, as such—with the consent of the Court, and only with such consent—the prosecution was entitled to put to him his earlier statement with the object of impeaching his credit.

The learned President, in giving the reasons for his decision, has stated that the part of the statement made by the witness—i.e. the accused—was inadmissible because it consisted of hearsay evidence against the man then standing trial, i.e. the husband Eng Hong. With respect to the Magistrate, therein appears to be the fundamental fallacy of his reasoning. The statement made by the witness to the Police *could only be used* for the purpose of impeaching the witness's own credit; it clearly *could not be used* as evidence against the husband Eng Hong. The only value and effect of impeaching the credit of a witness by the production to him of an earlier and contradictory statement made by him is to render his sworn evidence valueless. The earlier, and unsworn, statement cannot be used as an alternative to, or in substitution for, his sworn testimony. (See *Mallal's Criminal Procedure*, 3rd Edition, pp. 138—9).

For these reasons I am of the opinion that the charge as laid before the learned President was a valid charge, and I accordingly direct that the case be remitted to him to hear and record the plea of the accused to that charge as laid.

Order accordingly

MARSHALL v. MARSHALL

[O. C. J. (Taylor J.) June 21, 1954]

[Singapore—Divorce No. 34 of 1953]

Divorce—Jurisdiction—Acquisition of domicile of choice.

To establish a domicile of choice it is necessary to adduce clear proof of two separate and independent facts, one concrete or physical and the other abstract or psychological. There must be actual residence for an indefinite period and there must also be an intention to remain so firm and positive as to exclude any intention to make an ultimate home in another jurisdiction.

DIVORCE, Trial of issue on Domicile.

J. L. P. Harris for the petitioner.

M. W. Maxwell for the respondent.

The facts appear sufficiently from the judgment:

Taylor J.:—In this divorce suit the question of domicile was tried as a preliminary issue.

Both parties are English and admittedly their domicile of origin was in England. The husband claims to have acquired a domicile of choice in Singapore. The question is whether he has established himself here in the sense of a man who has not only quitted his country of origin but has also settled in a new country. There must be not only a physical settlement but also a settled state of mind, an *animus manendi*.

The burden of proof on the party alleging this is specially heavy and is also difficult because the fact to be proved is the intention either of a man who has died or of a living man whose declarations are suspect because they are *post litem motam*. No particular fact is decisive. There is no generally applicable test. A fact such as buying a house is highly significant in one case but unimportant in other circumstances. The question can be answered only on a critical review of all the circumstances of the man's life up to the material date.

The husband in this case is by birth a Londoner and by profession an analytical chemist. During the war he worked as a scientist for the Home Government. Then he started a chemical manufacturing business at Chesterfield. This still exists but did not prosper to his satisfaction. He could have obtained salaried work in England but for years he had been hankering to go abroad so, after considering available vacancies in Egypt and Australia, he finally accepted Crown Agent's appointment and came to Singapore.

He sold his house at Chesterfield but anyone who was going abroad for a number of years would do that. It has no more significance than the sale of his car. It was suggested that he resolved at that time not again to reside permanently in England. I do not accept that suggestion but in any event such a resolve would

by itself be inoperative. His domicile of origin would survive even the firmest determination to reside out of England, until he became settled elsewhere. His mother's affidavit relating to that period has no weight whatever.

He was posted to Singapore and became ordinarily resident here with his wife and two children. The move, however, did not heal a pre-existing rift between his wife and himself and after about five months she returned to England with the younger daughter. The elder daughter, then aged six years is said to have elected to stay with him. Her election may be discounted but the fact that she stayed had a bearing later.

In 1951 the Government proposed to transfer the husband to Kuala Lumpur where, owing to the shortage of official quarters, he would have had to live in a hotel, probably for at least six months. This would have been highly unsuitable for a motherless daughter of seven years.

It so happened that a rare and almost unique vacancy in the profession of Chemistry occurred in Singapore just at that time. A commercial firm interested in chemicals and metallurgy wished to have a laboratory and the husband was introduced to them. It was arranged that they would finance the setting up of a laboratory in which he would work and train staff and, as their requirements would not fully occupy him, he was allowed private practice in addition. Also they provided a house for him. He took the post on these conditions, the Government accepting a month's notice.

Up to that date there is no doubt that his domicile of origin survived. He liked his work in the Government laboratory and had there been quarters for him in Kuala Lumpur he would have submitted to the transfer. Had his daughter already been at boarding school he might not have demurred to the hotel. Had they proposed to send him to Rhodesia or Cyprus he would probably have accepted, provided that a house was available.

In the event, he had to choose between quitting the public service and remaining in Singapore. He had to balance the prospects. The question of residence, if not dominant, was at least an important factor. He wanted a home for himself and his daughter. He chose to stay. That was an overt act, a definite step in the direction of making Singapore the place of his permanent residence, but it was not decisive.

In the course of his evidence the husband explained that the business of the laboratory has not developed quite as was expected. The volume of work from the promoters and their associates is relatively small but he has built up a local personal practice which now

provides about three quarters of the bench work. If the firm decided to give up the scheme they would probably allow him to take over the laboratory as a going concern for himself. He is, of course, not pensionable and at present there is no provident fund. He can see no prospect of ever making enough money to retire to England and in any event he does not wish to retire. He is not subject to any age limit and his present intention is to continue the practice indefinitely. He likes residing in Singapore and it suits his health.

All this is highly probable. He is now 45 years old. It would be hazardous for him to give up his present personal practice with a view to acquiring one in another country and increasingly difficult to obtain a salaried appointment. There is an increasing reluctance to retire, in most professions. High taxation, especially in England, militates against it. Singapore has never been unhealthy, by tropical standards, and modern improvements, especially control of malaria, have made it a healthy place. The vast majority of both officials and business men of non-Malayan origin, still contemplate ultimate retirement to some other country and therefore do not become domiciled here, however long their residence, but there is a noticeable tendency to remain longer, to return after provisional retirement for further periods of residence and, in a few instances, to settle finally.

The husband's declarations are suspect because when a man wants a divorce he is tempted to say whatever is required. At the best he is a biased witness. In this case, however, his divorce does not appear to depend entirely on establishing the domicile of choice. If he were held to be domiciled in England he could still proceed. The grounds on which relief is given are the same. Service of process would be easier as the wife resides in England. Presumably it is in some respects more convenient for him to proceed here or he would not contest the issue but in all the circumstances there is less reason than usual to doubt his veracity. He gave his evidence in a very frank manner. I distrust the inferences often drawn from demeanour but, for what it is worth, he was, in that respect, a satisfactory witness. Where the law impose a specially heavy onus the party ought not to rely on his own evidence alone for anything which can be proved independently. His own declarations are the most explicit evidence of his intentions but they ought to be tested by every available means. There is, however, little further evidence which this petitioner could have adduced. His business associates could not testify as to his future intentions. They might have corroborated the statements that three quarters of his practice is personal and that a new agreement is pending but I

do not think the failure to prove those facts independently is highly significant. He was not challenged on these points but his wife would have no means of contesting them. In custody proceedings in England he gave evidence that his domicile was in Singapore but I attach no weight to that. In answer to my question as to his having taken advice on the issue of domicile he said that none of the lawyers he had consulted were able to make the matter clear to him. He thought they did not understand it themselves.

A point often overlooked is that a finding that a man has a domicile of choice may be embarrassing to his children at a later date.

Also, the question is of practical importance to the wife at the present time but she is as likely as he is to be biased. The party alleging a domicile of choice must convince the Court, irrespective of the attitude of the opposite side.

The place of residence of a man's wife and children is an important factor but where the marriage has broken down the residence of the wife loses its significance. Thirty years ago it was unusual for European children to remain in Malaya beyond the age of seven but now that there are schools, especially at the Hill Stations, they stay much longer. The petitioner will probably send his daughter to England for four or five years for secondary education but girls in their later teens commonly rejoin parents resident in Malaya. Widening fields of employment are open to them and the social amenities of Singapore are attractive to many young women. There is therefore nothing odd or impractical in the view that the petitioner sincerely intends to make a permanent home here for himself and one or both of his daughters.

On the whole I am of opinion that in the exceptional circumstances of this petitioner's residence in the Colony, and having regard to family and economic factors it is highly probable that he has resolved to remain here indefinitely and, after some hesitation, I have accepted his evidence that that is his state of mind.

An immigrant who comes to make his fortune and then retire to some other country intends to reside indefinitely because it is impossible to say how long it will take him to accumulate the amount required. His intended residence is of indefinite duration but the purpose is transient. In such a case the domicile of origin survives.

To establish a domicile of choice it is necessary to adduce clear proof of two separate and independent facts, one concrete or physical and the other abstract or psychological.

There must be actual residence for an indefinite period and there must also be an intention to remain so firm and positive as to exclude any intention to make an ultimate home in another jurisdiction.

I am of opinion that this petitioner fulfils those requirements. The petition must therefore be set down for trial on the other issues.

Order accordingly.

Solicitors: *Braddell Bros; Sisson & Delay.*

BANK OF CHINA v. BRUSGAARD KIOSTERUD & CO.; and THE BANK OF EAST ASIA LTD.; and THONG LEE TRADING CO.

Third Parties.

[O. C. J. (Whyatt C.J.) January 20, 1956]

[Singapore — Suit No. 594 of 1954]

Bills of Lading Act, 1855, ss. 1 & 3 — Claim for damages for failing to deliver goods stated in bill of lading — Whether bank to whom the goods are pledged can sue on bill of lading — Whether owners of vessel are estopped from denying the contents of the packages shipped on the vessel.

This was a claim by the plaintiffs against the defendants, the owners of the S.S. *Helios* for damages for failing to deliver to them in Singapore certain goods which they alleged were shipped at Hong Kong by that vessel for carriage to Singapore upon the terms stated in a bill of lading dated March 20, 1953. It was argued on behalf of the plaintiffs that (a) they were entitled to sue the defendants on the bill of lading by virtue of section 1 of the Bills of Lading Act and (b) the defendants were estopped by section 3 of the same Act from denying that the contents of the packages were as described in the bill of lading.

Held: (1) on the facts the plaintiffs had failed to discharge the onus of proof which rested on them of proving the contents of the packages mentioned in the bill of lading and the value of those packages; (2) the correct inference from the conduct of the plaintiffs and the shipper of the goods in this case was that the shipper was to effect a pledge of the goods to the banks and therefore the plaintiffs cannot rely upon section 1 of the Bills of Lading Act, 1855 and consequently they cannot sue the defendants on the bill of lading; (3) as the bill of lading in this case was not signed by the defendants but by the agents for the defendants in Hong Kong as shipping agents, the defendants did not incur any liability under section 3 of the Bills of Lading Act.

Cases referred to:—

- (1) *Sewell v. Burdick* (1884) 10 A.C. 74.
- (2) *The Prinz Adalbert* (1917) A.C. 586.
- (3) *Thorman v. Burt* (1886) 54 L.T. 394.